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Supreme Court of the United States

OCTOBER TERM 1897.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

REPLY BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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DOUD & FOWLER,
Attorneys for Plaintiff in Error.

THE SMITH-BROOKS PRINTING CO., DENVER, COLO.

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I.

It is contended on behalf of defendant in error that the question involved in this case is not one of "jurisdiction of the court," within the meaning of the Circuit Court of Appeals act. In support of that contention three decisions of this court are cited, namely:

Smith vs. McKay, 161 U. S., 355.

Cary vs. Railway Co., 161 U. S., 115.

Murphy vs. Colorado Paving Co., 166 U. S., 714.

We submit that none of these cases are in point. In the first one, Smith vs. McKay, the supposed question of jurisdiction was whether the lower court should have entertained the complainant's bill in equity. The contention of appellants there was that the case made out was one at law. This court held that such a question was not one of jurisdiction within the meaning of the above mentioned act. The language found near the bottom of page 358 of said 161 U. S., *if taken alone*, gives some color to counsels' claim, that it is applicable in this case. It is there said that "when the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches." The meaning of this language is controlled by the facts on which it is based. It appears from the decision itself that there was no question in that case as to the jurisdiction of the court over the defendant. It was admitted that defendant was in court. On page 357, in stating the position of appellee in that case, the court said: "If the Circuit Court has jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it has no jurisdiction on its equity side raises no question of jurisdiction within the meaning of the act under which this appeal is taken." Furthermore, the court dismissed the appeal in that case on the express ground "that the objection was *not* to the *want of power* in the Circuit Court to entertain the suit, but to the want of equity in the complainants' bill." It is apparent that this court did not intend to say, and we think its language did not convey the idea, that the jurisdiction of the lower court attaches in *every* case "when the requisite citizenship of the parties appears and the subject matter is such that the Circuit Court is competent to deal with it," regardless of whether such court has obtained jurisdiction of the defendant or not. The question in the case at bar *is* one going to the "want of power" in

the District Court. There being no such question in the case cited by counsel for defendant in error, what was there said must be read in light of that fact. So read, there is nothing in the decision of Smith vs. McKay which tends to exclude a question of jurisdiction of the defendant from consideration by this court on a writ of error brought under the Circuit Court of Appeals act. Indeed, it is a fair inference from that case that, as the question here *is* one of "want of power" over defendant, that this court has jurisdiction of this review.

The second case, Cary vs. Railway Co., as we understand it, merely holds that in the original suit, the Federal Court had jurisdiction because of diverse citizenship; and in a suit which was ancillary to that, the Federal Court retained its jurisdiction; and under the express terms of the Circuit Court of Appeals act, the Circuit Court of Appeals had final jurisdiction in that case, because the jurisdiction depended upon the diverse citizenship of the parties only. We think such a case has no bearing on the case at bar.

No opinion of the court is reported in the third case cited, that of Murphy vs. Colorado Paving Co. It is said, however, that the appeal was dismissed upon the authority of Smith vs. McKay.

Jurisdiction of the court over the defendant is *one* of the two coördinate elements of jurisdiction. There is nothing in the cases cited on behalf of defendant in error, and considered above, which in any way limits the meaning of the phrase "jurisdiction of the court," as used in the Circuit Court of Appeals act, to the *other* coördinate element of jurisdiction, namely, jurisdiction of the subject matter. There is nothing in the act itself which indicates that the word "jurisdiction," as used in the act, has any other than its usual meaning. So used, it clearly includes both branches of jurisdiction.

We submit that the question as to whether the District Court, by its so-called summons, obtained jurisdiction over the defendant, is a question of jurisdiction within the meaning of the Circuit Court of Appeals act.

II.

It is not our contention, as counsel say they understand it to be, that the lower court might have power to fix a longer, but not a shorter period for answer than that prescribed by the Colorado Code. Neither is it our contention, as counsel seem to believe, that the Colorado Code controls "forms and modes of proceeding" in such particulars as have been directly regulated by the act of Congress. We contend that the Federal District and Circuit Courts must make their practice conform to that of the States in which they are located, in all substantial particulars in which Congress has not directly regulated such forms and modes of proceeding. Congress has not, directly, provided what the summons shall contain in a common law action. It has indirectly done so in said section 914. It has not fixed the time for answering that shall be inserted in a summons, except as it has done so in section 914. But by this section, Congress says clearly that the "forms and modes of proceeding," in cases like the one at bar, shall conform as near as may be to the practice, pleadings and forms of the State.

It is thus clearly provided, by act of Congress, what the summons shall contain. The summons in question is in violation of the State law, and so in violation of the act of Congress.

Counsel for defendant in error point out that a summons under the State Code may be issued by the plaintiff's attorney. This, they say, can not be done in the Federal Courts. That is true, because section 911 of the Revised Statutes of the United States expressly provides

that the summons must be under the seal of the court, signed by the clerk, and bear teste of the judge. It has been repeatedly decided by the Federal Courts that a summons issued in violation of said section 911 of the Revised Statutes is void and does not confer jurisdiction. It is just as clear that a summons issued in violation of section 914 of the Revised Statutes fails to confer jurisdiction.

In the case of The Indianapolis Railroad Company vs. Horst, 93 U. S., cited by counsel for defendant in error, the question was not clearly one of "forms and modes of proceeding." The question there was, whether the Federal judge was compelled to instruct the jury to make special findings upon particular questions of fact; and it was held by the court that section 914 was not intended "to fetter the judge in the personal discharge of his accustomed duties or trench upon the common law powers with which in that respect he is clothed," and that that section was not intended to control the manner in which the judge should discharge his duties in charging the jury. The later case of Amy vs. Watertown, 130 U. S., 301, cited by us in our opening brief, is much more clearly in point than the case of Indianapolis Railroad Company vs. Horst.

In the later case the nature of the question involved is identical with the question in the case at bar, and it was there said that in such matters "the Federal Courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the State law."

The case of St. Clair vs. United States, cited by counsel for defendant in error, was a criminal case, and section 914 is expressly limited in its application to civil cases. The case can not be in point here. Counsel quote a portion of section 918, Revised Statutes, to the effect that the Federal Courts may "regulate their own practice

as may be necessary or convenient," etc. But it is clear from a reference to the preceding portion of the section that it does not in any way conflict with section 914, because it is expressly stated that such regulation shall be in a "manner not inconsistent with any law of the United States."

Counsel for defendant in error mention some reasons why the rule of the Federal District Court in question is a wise one. Equally forcible reasons might be cited as to why it is unwise. But these reasons and arguments, it seems to us, are proper to be addressed to the legislature only. The Congress of the United States has said that the summons in such particulars as are not directly regulated by it, shall conform to the State statute, and the summons in question fails to do that in a substantial particular. It is not a summons authorized by any law whatever. It is, therefore, not a summons. It is a nullity.

Counsel cite the following cases of the Federal Circuit or District Courts in support of their proposition that these courts have the right to regulate their process.

Middleton Paper Co. vs. Rock River Paper Co., 19 Fed., 252.

Lowry vs. Stors, 31 Fed. Rep., 769.

Schwabacker vs. Reilly, 2 Dillon, 127.

Martin vs. Chriscuola, 10 Blatch., 211.

The first case, the Middleton Paper Co. vs. Rock River Paper Co., involved the question of whether a garnishee summons issued by the plaintiff's attorneys, instead of by the clerk of the court, was valid or not. It was held that section 911 of the Revised Statutes made it necessary that the summons should be issued by the clerk and should bear the teste of the judge, and it was said that in other respects than these, all writs of the court "are in substance and form as prescribed

by the laws of the State." Under this authority, the summons in the case at bar should have conformed to the State Code. In the Middleton case, after it was held that the summons was not valid, a motion was made to amend the summons by having it signed and tested as provided by section 911. The court denied the motion and said that there was *nothing* to amend. The garnishee summons issued in violation of section 911 was a nullity. Such a summons was not process, either regular or irregular. This reasoning is applicable to the case at bar.

The case of Lowry vs. Stors, cited on behalf of defendant in error, involved a motion to collect a penalty in the Federal Court from its marshal, which penalty was imposed by a State statute. This, it was held, could not be done. Then the court, after expressly stating that its further opinion was not necessary to the decision of the case, proceeded to a discussion of the question as to whether its rule that a summons must be served by leaving a copy thereof with the defendant, was valid, when it was provided by the State statute that the summons might be served by reading to the defendant. And in this obiter discussion the court arrived at the conclusion that its rule was not a violation of the State statute or of section 914 of the Revised Statutes of the United States, "as it (the Federal Court's rule) *includes* the state mode of procedure and more effectually secures personal service on defendants." It thus appears that the rule of court in that case required service of summons in both ways, so there was no possible conflict.

Schwabacker vs. Reilly is also cited by counsel for defendant in error as authority for the Federal Courts to regulate their own process. That was a case in which the service of summons was by a private person instead of by the marshal, and the court pointed out that the

Judiciary Act of the United States made it the marshal's duty to serve the summons. Such a case is not an authority against the position that the summons must comply with the State Code, as section 914 says it shall.

The last case cited is that of Martin vs. Chriscuola. There it was decided that the action could not be commenced by issuance of summons by complainant's attorney. The whole case was governed by the express provisions of section 911 of the Revised Statutes. In such a case it could not be claimed that the State law governs.

We submit that the substance of the summons is not a matter of discretion with the Federal District and Circuit Courts, as suggested by counsel. It is not a matter under their independent direction. Such conformity with the State laws as the mandatory terms of section 914 require is essential. Where the provisions of that statute are overridden and the requirements of the State statute disregarded in substantial particulars, as was done in the summons in this case, jurisdiction of the defendant is not acquired.

Respectfully submitted,

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